COURT OF APPEALS DECISION DATED AND FILED

July 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1600 **Cir. Ct. No. 2014CV29**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DANIEL VIRNICH,

PLAINTIFF-APPELLANT,

V.

JEFFREY VORWALD AND AMERICAN TRUST & SAVINGS BANK,

DEFENDANTS-RESPONDENTS,

MICHAEL POLSKY AND BECK, CHAET, BAMBERGER & POLSKY, S.C.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Grant County: CRAIG R. DAY, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Daniel Virnich appeals a judgment of the circuit court granting summary judgment in favor of American Trust & Savings Bank

("the Bank") and Jeffrey Vorwald, an employee and officer of the Bank (collectively, "the Respondents"). Virnich brought suit against the Respondents alleging that they had conspired with Michael Polsky to maliciously cause Virnich injury in his "reputation, trade, business or profession," in violation of WIS. STAT. § 134.01 (2013-14).[1] In this appeal, Virnich makes two contentions. He argues that the circuit court erred in quashing his subpoenas duces tecum served upon Polsky and the law firm of Beck, Chaet, Bamberger & Polsky, S.C., and that the evidence on summary judgment establishes a factual dispute as to Virnich's § 134.01 claim against the Respondents. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Virnich and Jack Moores owned, albeit indirectly, and were the sole officers of Communications Products Corporation. In June 2003, Communications Products defaulted on a loan to the Bank, Communications Products' largest creditor. Following Communications Products' default, the Bank petitioned for receivership of Communications Products under WIS. STAT. ch. 128, alleging that Communications Products was insolvent. The circuit court appointed Polsky as the receiver for Communications Products. Following Polsky's appointment as receiver, various legal proceedings took place, none of which are directly relevant to the present case. *See e.g.,* ***Polsky v. Virnich***, 2010 WI App 20, 323 Wis. 2d 811, 779 N.W.2d 712 (Polsky commenced an action

[1] WISCONSIN STAT. § 134.01 makes it unlawful for "[a]ny 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his or her reputation, trade, business or profession by any means whatever."

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

against Virnich and Moores alleging a breach of fiduciary duties. A jury returned a verdict against Virnich and Moores, which was overturned on appeal on the ground that, because Communications Products was still a going concern at the time of Virnich and Moores' alleged misconduct, under existing case law, a claim for breach of fiduciary duty to creditors was barred); ***American Trust & Savings Bank v. Communications Products Corp.***, 2013 WI App 30, 346 Wis. 2d 278, 827 N.W.2d 928.

¶3 In 2014, Virnich brought the present action against the Respondents, Polsky and Polsky's law firm, alleging that the Respondents conspired with Polsky to maliciously injure Virnich's business and reputation in violation of WIS. STAT. § 134.01. Polsky and the Respondents separately moved for summary judgment. The Respondents argued that there is no genuine factual dispute as to whether they maliciously conspired with Polsky to cause Virnich harm.

¶4 On November 14, 2014, after the Respondents had moved for summary judgment, Virnich submitted to Polsky and Polsky's law firm requests for the production of documents. In response to those requests, Polsky and his law firm moved the circuit court for a protective order. After briefing and a hearing on the motion for a protective order, but before the circuit court ruled on the motion, the circuit court granted summary judgment in favor of Polsky and his law firm on the basis that Polsky has quasi-judicial immunity from suit in this action.[2]

[2] The issues related to the circuit court's decision regarding Polsky and Polsky's law firm are not part of this appeal. A separate opinion on the appeal related to those parties is issued this same day. *See* ***Virnich v. Vorwald***, No. 2015AP908, unpublished op. and order (WI App July 28, 2016).

¶5 Following summary judgment in favor of Polsky and his law firm, an issue arose as to whether the dispute over Virnich's November 14, 2014 requests for the production of documents were moot. In an effort to sidestep the issue of mootness, Virnich then issued subpoenas duces tecum to Polsky and Polsky's law firm.[3] Attached to each of the subpoenas was an identical list of forty-four separate requests for the production of various items. That is, the items demanded by the subpoenas are identical to the items demanded in Virnich's November 14, 2014 requests for the production of documents.

¶6 Polsky and his law firm responded to Virnich's subpoenas with a motion for a protective order and to quash the subpoenas duces tecum. Polsky and his law firm asserted the same objections to the documents sought by the subpoenas as they had asserted to the November 14 requests for the production of documents.

¶7 The circuit court granted Polsky and his law firm's motion for a protective order and quashed the subpoenas duces tecum. On the same date, the circuit court determined that the summary judgment submissions failed to create a factual dispute as to whether the Respondents had conspired to maliciously cause injury to Virnich, and the court granted the Respondents' motion for summary judgment and dismissed Virnich's claims against the Respondents. In this appeal, Virnich appeals the order quashing the subpoenas duces tecum and the order of summary judgment in favor of the Respondents.

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[3] WISCONSIN STAT. § 804.09(3) provides that the discovery rule for the production of documents by a party "does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land."

DISCUSSION

¶8 Virnich contends that the circuit court erred in quashing the subpoenas and in granting summary judgment in favor of the Respondents. On the second issue, he specifically argues that the summary judgment submissions establish a factual dispute as to whether the Respondents conspired with Polsky to maliciously cause injury to Virnich, in violation of WIS. STAT. § 134.01. We address each of Virnich's contentions in turn below.

A. Order Quashing of Subpoenas Duces Tecum

¶9 We review a circuit court's order relating to discovery for an erroneous exercise of discretion. ***Lane v. Sharp Packaging Sys., Inc.***, 2002 WI 28, ¶19, 251 Wis. 2d 68, 640 N.W.2d 788. We will uphold an exercise of discretion if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. ***Id.*** As we explain in the paragraphs that follow, we reject Virnich's argument that the circuit court erroneously exercised its discretion in quashing Virnich's subpoenas.

¶10 Through his subpoenas duces tecum, Virnich sought to compel Polsky and his law firm to produce various communications, documents, notes and memoranda which were identified in forty-four separately enumerated requests. In its order quashing Virnich's subpoenas and granting a protective order, the circuit court found that the subpoenas:

> are designed to discover evidence of malice by Polsky and thereby buttress the conspiracy claim against [the Respondents]. The requests do not seek information relating to communications between [the Respondents] and Polsky….

> … [The subpoenas] relate to information regarding [] Polsky's communications with third parties. The discovery[,] if had[,] cannot reasonably be calculated to lead to the discovery of evidence to buttress assertions of malice by [the Respondents].

¶11 Virnich asserts that the circuit court erroneously exercised its discretion in quashing his subpoenas duces tecum and granting the protective order because, according to Virnich, the items he sought via the subpoenas "may demonstrate [] malice" by the Respondents. Virnich asserts that included in the documents requested are communications that "may have [] involved Vorwald and/or other agents of [the Bank] and may provide further evidence of [the Respondents'] malice."

¶12 Virnich specifically points to the following two of his requests in the subpoenas:

> Request No. 17—Produce all communications or other documents sent to or received from Attorney Thomas Basting or his law firm relating to [Communications Products], Virnich, Moores or Attorney Basting's investigation and evaluation of potential claims against insiders as referenced in paragraphs 46 and 47 of the Polsky Affidavit.[4]
>
> Request No. 18—Produce copies of any notes, memoranda, or other documents that memorialize any oral communications with Attorney Thomas Basting or his law firm relating to [Communications Products], Virnich, Moores, or Attorney Basting's investigation or evaluation

[4] In summary, Polsky averred in paragraphs 46 and 47 of the affidavit referenced in request 17 that Polsky determined that it was in the best interests of the receivership estate and creditors to investigate whether any claims could be asserted against Virnich and Moores, and that, with the circuit court's permission, Polsky retained Attorney Thomas Basting to investigate and evaluate potential claims against Virnich and Moores. Polsky further averred that Basting had advised Polsky that the estate could assert a viable claim against Virnich and Moores, and that Attorney Robert Kasieta was then retained to evaluate the claim.

> of potential claims against insiders as referenced in paragraphs 46 and 47 of the Polsky Affidavit.

In an attempt to explain why the information identified in requests 17 and 18 could reasonably lead to evidence of malice on the part of the Respondents, Virnich argues that an email from Vorwald to an attorney for the Bank, already a part of discovery, wherein Vorwald states that he will be meeting with Attorney Basting in nine days, "demonstrate[s] Vorwald was involved in at least one meeting with [Attorney] Basting to discuss pursuing claims against Virnich and Moores." Virnich argues that the following statement by Vorwald in that email demonstrates Vorwald's malice: "When possible, please move forward to keep the pressure on (we want to give [] Virnich & Moores something to ponder over the Thanksgiving & Christmas holidays)." It follows, according to Virnich, that additional communications in the records of Attorney Basting may show other communications with Polsky evidencing malice toward Virnich on the part of the Respondents.

¶13 As to the other requests contained in the subpoenas, Virnich argues that documents requested, which relate to other individuals who were involved in various ways in the litigation against Virnich and Moores, "may" reveal malicious conduct on the part of the Respondents. Virnich points out that the materials already disclosed in discovery show that the Respondents were involved in the strategies relating to Polsky's pursuit of claims against Virnich and Moores, and in Polsky's subsequent efforts to collect a money judgment against Virnich.

¶14 WISCONSIN STAT. RULE 804.01(2)(a), provides that anything that is "relevant to the subject matter involved in the pending action" is discoverable if the request "appears reasonably calculated to lead to the discovery of admissible evidence." The circuit court found that Virnich's discovery demands did not

concern information related to the Respondents, but instead concerned information related to communications between Polsky and others. The court found that such information was not reasonably calculated to lead the discovery of admissible evidence of malice on the part of the Respondents.

¶15 Virnich does not argue that the circuit court erred in concluding that the evidence he sought to discover was not "reasonably calculated to lead to the discovery of admissible evidence" related to malice by the Respondents. Rather, Virnich seemingly believes it is sufficient to argue that the discovery he sought "may" lead to admissible evidence of malice. However, "may" lead is not the standard under WIS. STAT. Rule 804.01(2)(a). Looking at the correct standard, we conclude that the circuit court reasonably determined that the requested material was not reasonably calculated to lead to admissible evidence.

B. Summary Judgment

¶16 This court reviews a grant or denial of summary judgment de novo. ***Mach v. Allison***, 2003 WI App 11, ¶14, 259 Wis. 2d 686, 656 N.W.2d 766. A moving party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). In determining whether any factual issues exist, we review the summary judgment submissions, which can include the pleadings, depositions, answers to interrogatories, admissions on file and any affidavits, to determine whether the moving party has made a prima facie case for summary judgment. ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980); *see* WIS. STAT. § 802.08. If a prima facie case is made, we examine the opposing party's affidavits and other proofs to determine whether there are any disputed issues of material fact, or disputed material facts from which reasonable alternative

inferences may be drawn, that are sufficient to entitle the opposing party to a trial. ***Id.***

¶17 To establish a prima facie entitlement to summary judgment, the party moving for summary judgment must explain the basis for his or her motion and identify those portions of the summary judgment submissions that he or she believes demonstrate that no genuine issue of material fact exists for trial. ***Leske v. Leske***, 197 Wis. 2d 92, 97, 539 N.W.2d 719 (Ct. App. 1995). If the moving party is able to demonstrate that there are no facts of record that support an element on which the opposing party has the burden of proof at trial and sufficient time for discovery has passed, the party who bears the burden of proof at trial must make a showing sufficient to establish the elements of his or her case. ***Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (1993).

¶18 With these principles in mind, we turn to the issue at hand. Virnich alleges that the Respondents conspired with Polsky to maliciously cause injury to Virnich contrary to WIS. STAT. § 134.01.[5] A claim for a conspiracy in violation of WIS. STAT. § 134.01 requires that the plaintiff establish the following four elements: (1) the defendants acted together, (2) with a common purpose to injure the plaintiff's business, (3) with malice, and (4) the acts financially injured the plaintiff. ***Onderdonk v. Lamb***, 79 Wis. 2d 241, 247, 255 N.W.2d 507 (1977); WIS JI—CIVIL 2820. The Respondents argue on appeal that the summary judgment

[5] Although WIS. STAT. § 134.01 serves as a criminal statute, a party may bring a civil action under the section to recover damages caused by its violation. ***Brew City Redevelopment Group, LLC v. The Ferchill Group***, 2006 WI App 39, ¶17, 289 Wis. 2d 795, 714 N.W.2d 582.

submissions do not create a genuine issue of fact as to whether they acted with malice and, therefore, summary judgment in their favor was appropriate.

¶19 Malice is an "integral element" of a conspiracy claim under WIS. STAT. § 134.01, and "must be proved in respect to [all] parties to the conspiracy." ***Maleki v. Fine-Lando Clinic Chartered, S.C.***, 162 Wis. 2d 73, 86, 469 N.W.2d 629 (1991); *see* ***Brew City Redevelopment Group, LLC v. The Ferchill Group***, 2006 WI App 39, ¶17, 289 Wis. 2d 795, 714 N.W.2d 582 ("all parties to the alleged conspiracy must act from § 134.01 'malice'"). Our supreme court explained in ***Maleki*** that "[f]or conduct to be malicious under conspiracy law[,] it must be conduct intended to cause harm for harm's sake." ***Maleki,*** 162 Wis. 2d at 86. Malice in a § 134.01 claim means to: "'do[] a harm malevolently for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired [such as hurting someone else's business by competition].'" ***Id.*** at 87-88 (quoting and adopting interpretation of § 134.01's predecessor statute by ***Aikens v. Wisconsin***, 195 U.S. 194, 203 (1904)). Therefore, in order to prove his claim, it is necessary for Virnich to show a conspiracy in which all actors were motivated by an intent to injure Virnich as "an end in itself."

¶20 To prove that a defendant's conduct was intended to cause harm for the sake of harm, the court in ***Maleki*** stated that the plaintiff "must show more than a mere suspicion or conjecture that there … [is] evidence of the elements of a conspiracy." ***Maleki,*** 162 Wis. 2d at 84. The court quoted with approval the following statement from the seventh circuit's decision in ***Allen & Ohara, Inc. v. Barrett Wrecking, Inc.***, 898 F.2d 512, 516 (7th Cir. 1990): "In Wisconsin, if circumstantial evidence supports equal inferences of lawful action and unlawful action, then the claim of conspiracy [under sec. 134.01, Stats.] is not proven." ***Maleki***, 162 Wis. 2d at 84-85.

¶21 Before proceeding, we note that there is a lack of precision in Virnich's arguments with respect to which particular acts were done with malice. Plainly Virnich contends that the Respondents acted maliciously when they made contacts with various parties in an effort to initiate a receivership. Also, Virnich seemingly contends that some acts taken after the receivership was in place were done with malice. However, we perceive ambiguity as to exactly which of the Respondents' actions are covered by Virnich's claim. However, we need not resolve this ambiguity because, regardless of which particular acts are in play, Virnich loses based on our analysis of the Respondents' alleged malice.

¶22 We conclude that the evidentiary materials relied on by the Respondents in support of their motion for summary judgment provide a prima facie basis for relief. These evidentiary submissions show the following facts that support the inference that the conduct at issue was legitimate and not done with a malevolent purpose. The facts include evidence that Virnich admitted that Communications Products was in default of its obligations to the Bank, which were immediately due, when the receivership was commenced and that the loan documents between the Bank and Communications Products permitted the Bank to seek a guarantee from third parties, including Virnich, for Communications Products' outstanding loan obligations. They show that Virnich had informed the Bank that Communications Products would have to be shut down if Communications Products and the Bank did not reach an agreement on Communications Products' debt to the Bank, thereby indicating a risk that Virnich might soon "shut down" Communications Products, that the Bank contacted Communications Products' other secured lender, which held a first mortgage on Communications Products' real estate, to inform the other lender about the possibility of commencing a receivership, which the other lender supported; and

that the Bank sought the appointment of a receiver for Communications Products to ensure that Communications Products continued to operate and so that its assets could be sold as a going concern. The evidentiary materials also show that the Bank was aware of the fact that in the months prior to the receivership, Communications Products had issued a payment to Communications Products' parent company, which is controlled by Virnich, in the amount of $500,000. All of this information supports the view that the Respondents had a legitimate concern about the ability of Communications Products to meet obligations and remain a going saleable concern.

¶23 In contrast, nothing in the evidentiary materials relied on by the Respondents suggests that their actions prior to or after the appointment of Polsky were taken to harm Virnich for harm's sake. Thus, we conclude that the Respondents have made a prima facie showing that Virnich cannot succeed on his WIS. STAT. § 134.01 claim against them because malice on their part cannot be proven. We further conclude, for the reasons explained more fully below, that nothing in the affidavits and evidentiary materials submitted by Virnich in opposition to the Respondents' summary judgment motion is sufficient to rebut the Respondents' prima facie case.

¶24 Virnich argues that the summary judgment record permits the inference that the Respondents acted maliciously to harm him. We conclude, however, that nothing in the record reasonably permits such an inference.

¶25 In support of his position, Virnich relies on his affidavit in which he averred that he had informed Vorwald that Virnich was willing to invest additional funds in Communications Products to ensure Communications Products could continue to operate and that Virnich attempted to reach an agreement with

Vorwald on the repayment of its loans to the Bank, but that Vorwald insisted that Virnich and Moores personally guarantee the Bank's loans to Communications Products. Virnich relies on evidence that the Bank sought the ex parte appointment of a receiver for Communications Products based upon an affidavit by Vorwald that Communications Products was insolvent or in imminent danger of insolvency, which Virnich asserts was "false." As to Vorwald's affidavit, Virnich asserts on appeal that Vorwald "lied about … what [Vorwald] and [the Bank] knew about [Communications Products'] financial situation."

¶26 In support of the assertion that Vorwald lied about what he knew, Virnich cites this court to various portions of Vorwald's deposition, a letter from him to the Bank as to his intent to advance money to Communications Products and restructure Communications Products' leases, a summary prepared by the Bank of Communications Products' financial performance in a presentation to the Bank's loan committee, and an auditor's report on Communications Products' financial statements, which Virnich believes establishes, circumstantially, that Communications Products was not in imminent danger of insolvency. However, none of this evidence establishes that Vorwald did not believe that Communications Products was in imminent danger of insolvency at the time his affidavit was filed, much less that Vorwald lied about what he knew.

¶27 Virnich also relies on the following: (1) affidavits from two individuals who had worked for Communications Products and who averred that Vorwald had referred to Virnich as a "very bad [man]"; (2) a valuation of Communications Products submitted to the circuit court by Polsky in the receivership action, that did not include a value for Communications Products' goodwill; (3) valuation information provided by Polsky to the circuit court in the receivership action that may have omitted the value of certain real estate holdings;

(4) evidence that, as referenced in ¶12 above, Vorwald stated in an email to an attorney for the bank: “When possible, please move forward to keep the pressure on (we want to give [] Virnich & Moores something to ponder over the Thanksgiving & Christmas holidays)”; (5) evidence that Vorwald twice contacted Federal Bureau of Investigation agents to inquire about that agency’s interest in investigating a financial situation like the one involving Virnich and Communications Products; (6) evidence that Polsky and the Bank objected to Virnich and Moores’ motion to file a derivative action on behalf of Communications Products against the Bank; (7) evidence that the Bank offered to purchase Communications Products’ claims against the Bank; (8) evidence that the Bank agreed to indemnify the law firm and its attorneys who represented Polsky for any liability arising out of Polsky’s action against Virnich; (9) evidence that a defendant was named in Polsky’s action against Virnich, which prevented the removal of the case from state court to federal court; (10) evidence that the Bank asserted to Polsky, after a judgment was entered against Virnich in the action against him, that Polsky had a duty to immediately collect the judgment and that the judgment should be reported on Virnich’s credit report; and (11) evidence that Vorwald contacted a client of Virnich’s and told the client that Virnich was charging the client excessive fees.

¶28 As stated above, Virnich cannot overcome the Respondents’ prima facie case for summary judgment unless the inference of unlawful action that can be drawn from the circumstantial evidence is greater than the inference of lawful action that can be drawn. *See **id.*** at 90; ***Allen***, 898 F.2d at 516. Here, at best from Virnich’s point of view, there are some weak inferences of potential malice by the Respondents. Thus, the inference of unlawful motivation is plainly less than the inference of lawful motivation.

¶29 As summarized above, there is extensive evidence that the Respondents had independent, lawful reasons for making an ex parte request for the receivership of Communications Products, for their actions to collect from Virnich Communications Products' outstanding debts, and for their actions to collect from Virnich the significant money judgment against him. These are all actions that a reasonable creditor in the Respondents' position would take to protect themselves in a default situation. In addition, the context of a business apparently going insolvent and in need of a receivership is a context in which the Respondents would legitimately and naturally harbor and express concerns about the conduct of someone in Virnich's position, without necessarily harboring any malicious feelings.

¶30 There is some inference from the evidence, albeit a very weak one, that Vorwald personally could have harbored some ill will toward Virnich. The strongest evidence would appear to be Vorwald's description of Virnich as "bad." Less probative is evidence that Vorwald informed a client of Virnich's that Virnich charged that client excessive fees, which depending on other evidence might support a negative inference against Vorwald. However, evidence here of a conspiracy motivated by malice is essentially nonexistent. In order for there to be a conspiracy, all conspirators must have malicious intent. *See* ***Maleki***, 162 Wis. 2d at 86.

¶31 In sum, we conclude that the evidence in the summary judgment materials reflect at most only weak inferences of potential malice by even Vorwald, given the context and circumstances. For these reasons, we conclude

that Virnich has not overcome the Respondents' prima facie case for summary judgment, and affirm summary judgment in favor of the Respondents.[6]

CONCLUSION

¶32 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[6] Virnich filed a motion to submit a supplemental brief in this case in the event that we address the issue of whether the evidence shows that Polsky acted with malice. Because we do not address that issue, we deny Virnich's motion.